91-782

No._____

In The

Supreme Court of the United States

October Term, 1991

ANDREW JENKINS,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether petitioner's motion to dismiss both counts of the superseding indictment on the grounds that (a) Count One, an alleged violation of the Travel Act, 18 U.S.C. 1952, cannot be an offense under law, and (b) Count Two, the Glass-Steagall Act, 12 U.S.C. 378, fails to state an offense, should have been granted.

2.

Whether petitioner's motion for a new trial based on (1) the failure of trial counsel to inform him promptly of his application for a position with the United States Attorney for the Southern District of New York, the prosecuting agency below, and (2) the inadequate allocution conducted by the trial judge following the disclosure by trial counsel of the pendency of said application, should have been granted.

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In The

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ANDREW JENKINS

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, ANDREW JENKINS, herewith prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Second Judicial Circuit to review its decision of August 13, 1991, affirming petitioner's judgments of conviction.

CITATION TO OPINION BELOW

The opinion of the Second Circuit, affirming petitioner's judgments of conviction in the United States District Court for the Southern District of New York, is annexed hereto as Appendix (App.) A.

JURISDICTION

The opinion-decision of the United States Court of Appeals for the Second Judicial Circuit was entered on August 13, 1991. The

mandate issued on September 9, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions are as follows:

Amendment Five

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury... nor shall any person...be deprived of life liberty, or property, without due process of law....

Amendment Six

> In all criminal prosecutions, the accused enjoy...the assistance of counsel for his defense.

PRAYER FOR REVIEW

Petitioner avers that this Honorable Court should review this case. It involves serious Fifth and Sixth Amendment issues relating to (a) the Travel Act, 18 U.S.C. 1952; (b) the Glass-Steagall Act, 12 U.S.C. 378; and (c) the right of petitioner to an attorney without an impermissible conflict of interest and the untimely disclosure thereof.

THE BASIS FOR FEDERAL JURISDICTION

In this case, Petitioner was charged with criminal offenses which constituted the basis for federal jurisdiction of the United States District Court for the Southern District of New York.

STATEMENT OF THE CASE

On August 1, 1987, petitioner was arrested at the Plaza Hotel, in New York City, in the absence of any warrant therefore, solely for his alleged violation of 31 U.S.C. 5316. At that time, an illegal search

was conducted of his unlocked briefcase and yielded a number of business documents which, following their translation from French to English by the Government, led in September 21, 1987, to an indictment, charging him with a violation of the Glass-Steagall Act, 12 U.S.C. 378.

On June 10, 1988, the district court, upon petitioner's motion, dismissed Count One, the primary count of that indictment, for failure to charge a crime, and granted his further motion to suppress the evidence earlier seized from his briefcase, with the exception of the cash. The district court's opinion can be found at 689 F. Supp. 342 (S.D.N.Y. 1988). The Government appealed the suppression order to the Second Circuit which explicitly found that petitioner's "arrest was illegal" for want of probable cause. 876 F.2d 1085, 1089 (2d Cir. 1989). It further held that the Government was entitled to call "time out" and recover the sting money from the briefcase. It remanded solely for the purpose of a further evidentiary hearing to determine whether any other items in the briefcase were in plain view when the sting money was recovered. Despite the extensive testimony of two Government agents, who insisted they immediately observed all items in the brief case and at once understood them to be incriminating of some unspecified crime, the district court, on remand, suppressed the evidence.

On December 15, 1989, following the submission of the aforesaid appeal, two-and-a-half years after petitioner's arrest for an alleged violation of 31 U.S.C. 5316, the Government obtained the superseding indictment here at issue. In sum, it alleged that petitioner caused a telephone call to be made, and then accepted possession of government funds, all of which, supposedly and in some logically unexplained way, facilitated his non-compliance with a future legal duty, i.e., filing the requisite Customs form.

On or about April 11, 1990, petitioner moved to suppress illegally obtained evidence, including prospective trial testimony, on the

ground that it was "fruit of the poisonous tree." Said motion was denied by the trial judge on or about April 18, 1990.

On May 1, 1990, a day after trial had commenced, and following the denial of the aforesaid motion to suppress, petitioner moved below for an order to dismiss the superseding indictment on the grounds set forth above. The district court, when trial counsel attempted to address this motion on April 30th, responded by stating that it had no such motion before it, but petitioner could raise it, "maybe," after the Government's case had been concluded. Petitioner was arraigned on April 30, 1990, and, according to the docket sheet, a motion to dismiss was filed on May 1, 1990, with no entry as to its disposition, and it is assumed that it was denied *sub silentio.*[1]

On April 18, 1990, during a status hearing before the district court, the issue of a conflict of interest between petitioner and his counsel had arisen by virtue of the disclosure of the latter's application for a position with the Office of the United States Attorney for the Southern District of New York, The said court found no such such conflict existed and trial began on April 30, 1990, ending on May 7, 1990, with jury verdicts of guilty on both counts.

On May 17, 1990, petitioner, by present counsel, appearing specially, filed a motion for a new trial, pursuant to Rule 33, FRCrP, grounded on an asserted conflict of interest between petitioner and his trial attorney. At the same time, a motion for a judgment of acquittal, and related relief, pursuant to Rule 29(C), FRCrP, was served and filed by trial counsel.

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[1] As will be shown throughout Point III hereto, trial counsel, as here, was guilty of many deviations from normal criminal defense practice, thus raising the issue of whether, under *Strickland v. Washington*, 466 U.S. 668 (1984), he was denied the effective assistance of counsel.

On June 6, 1990, the district court refused to entertain the aforesaid motion for a new trial unless "trial counsel and special counsel file with this court appropriate papers authorizing appearance for the purpose requested." Although such papers were prepared by said special counsel and submitted to trial counsel with a request that they be executed by him and filed with the court, said trial counsel refused to do so.

However, on July 26, 1990, at petitioner's sentencing, the district court reluctantly permitted special counsel to argue the said motion for a new trial.[2] It then denied that and all other pending motions filed by petitioner and sentenced him to terms of imprisonment of a year and a day on each count of the indictment, each to run concurrently with the other.

The original indictment was then dismissed upon the Government's motion, and petitioner's appeal to the court below then followed. His motion for a stay of his surrender to begin his sentence was granted by the district court on October 21, 1991.

Argument

POINT ONE

AS THE PREDICATE OFFENSE IS ONE OF OMISSION, COUNT ONE CHARGES PETITIONER WITH AN ATTEMPTED CRIME OF OMISSION, OR, ALTERNATIVELY, WITH FACILITATING HIS OWN ACT OF OMISSION, WHICH IS ENTIRELY ILLOGICAL AND

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[2] Following petitioner's sentencing, special counsel, now appellate counsel, upon inquiry, was informed by trial counsel that the latter had refused to execute the papers required by the court below on the ground that it would be an admission of the asserted conflict of interest. Special counsel then wrote to the court below, explaining why the requisite papers ordered by it had not been filed.

THEREFORE NOT AN OFFENSE UNDER EXISTING LAW

A. General

Count One is premised on a violation of the Travel Act, 18 U.S.C. 1952, which provides, in pertinent part, that:

> [w]hoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce...with intent to...(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section, "unlawful activity" means...(3) any act which is indictable under subchapter II of Chapter 53 of Title 31, United States Code.

In essence, the Government alleged that, on July 28th and 29th of 1987, petitioner used the telephone (*i.e.*, a facility in interstate and foreign commerce) with intent to violate Title 31, United States Code, Sections 5316(a) and 5322, and thereafter did perform and attempt to perform such unlawful activity, *i.e.* "failing to file the report," (*United States v. Jenkins*, 689 F. Supp. 342, 343 (S.D.N.Y. 1988), when he accepted approximately $150,000 in cash from an undercover agent on August 1, 1987.

Count One charges (1) use of the telephone (an interstate facility); (2) with the intent to commit a future crime, *ergo*, not filing the Customs form in violation of 31 U.S.C. 5316; (3) by failing to file

the required from when the duty to do so arose; and (4) and "thereafter," (a) commission, and (b) "attempt[ed] commission of a violation of not filing the requisite form, in violation of said Section 5316, consisting of "accepting approximately $150,000 in cash" from the undercover agent.

Prior to trial, the original trial judge ruled that petitioner did not commit any crime of failing to file a Customs report, as there was no duty to do so when he was arrested. By law, that duty would arise only at the time and place of departure. *United States v. Jenkins*, supra. The duty was to do an act, not refrain from doing an act. It is legal to transport currency of any amount outside the country. The only duty is to declare it; thus, the failure to so declare is violative of an affirmative duty, *i.e.*, a pure crime of omission.

Therefore, to the extent that it is comprehensible, the Government charged petitioner with attempting to commit that offense through use of interstate facilities.[3] The crime attempted is one of omission, that is, an attempt *not* to file the Customs form when the duty to do so arose, accomplished somehow by a telephone call and taking possession of currency. Indeed, the Government specified that the act constituting the substantial step element of the attempt was "accepting approximately $150,000 in cash."

This is simply meaningless and illogical, for the following reasons:

B. It is Not Possible to Attempt A Pure Crime of Omission

There is no such crime as attempting to cause one's own crime of omission, including an attempted failure to file a Customs declaration under 31 U.S.C. 5316. Moreover, Congress could not,

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[3] As for the crime of facilitation, one cannot be charged with facilitating one's own crime.

and did not, mean to create such a crime when it added this section as a predicate offense under the Travel Act.

Section 5316 was added as a predicate offense to the Travel Act in 1986, but the legislative history reveals no specific discussion regarding the inter-relationship between its reporting requirements and use of the word "attempt" in the Act. Yet, it is quite clear that Congress did not intend to create a crime of attempting or facilitating one's own omission of filing the requisite Customs form.

The Congressional intent can be gleaned from other portions of the legislation, in which it made it a crime to attempt to cause *another* person to fail to file a Customs declaration. Specifically, 31 U.S.C. 5324, enacted at the same time, imposes criminal penalties on one who causes or "attempts to cause" a domestic financial institution to fail to file a currency transaction report. The specific evil addressed by this legislation was the practice of money launderers who structured deposits to make them less than the $10,000, thus skirting the reporting minimum. This and other methods were employed to cause *banks and other financial institutions* not to file currency reports, or to file materially inaccurate reports. *See*, Report, Senate Committee on the Judiciary, 9/3/86, to accompany S. 2683; Report, House Committee on Banking, Finance and Urban Affairs, 8/5/86, to accompany H.R. 5176.

The *Handbook on the Anti-Drug Act of 1986*, published by the Department of Justice, Criminal Division (March, 1987), describes the practice as follows:

> use of false payee or remitter names on checks or money orders; false information on account opening documents; artificially structuring single deposits; numerous artificial withdrawals or exchanges of currency in order to create a false appearance that multiple unrelated transactions were made; employment of runners to surreptitiously make deposits, withdrawals or

> exchanges; payment or receipts of a percentage for conducting deposits, withdrawals, or exchanges for which a bank would have charged no fee; and maintenance of multiple accounts for moving money among several banks or within one bank.

Thus, the Government's own interpretation of the Travel Act and Title 31 predicate offenses concern affirmative activities, *i.e.* crimes of commission, such as submission of false documentation, artificial structuring, and the like by which one may attempt to cause *another* party fail to meet his, her or its filing requirement. This analysis, as well as the legislative history, do not support the inference that Congress intended to create a crime which consisted solely of an attempt or facilitation of one's own failure to file a required report. To hold otherwise would be to believe that Congress meant that a person could take a substantial step an affirmative act towards a crime of omission, a failure to act.

Moreover, there are no other federal statutes which make criminal an attempt to cause one's own crime of pure omission. In contrast, the Court should compare 25 U.S.C. 7201, an "attempt to evade or defeat tax," which punishes only one who "wilfully attempts in any manner to *evade or defeat* any tax..."(emphasis added). The reported decisions under this provision make it abundantly clear that it punishes only affirmative acts of evasion or concealment, ranging from destruction or fabrication or records to the filing of false returns. It does not punish one who, having received income, has simply declared an intention not to file a return when April 15th rolls around, absent some further, affirmative steps toward concealment.

Similarly, the crime of failing to register for the draft, *viz.*, 50 U.S.C. 462, has not generated any reported case in which an individual has been convicted of attempting not to register or facilitating his own failure to register. In contrast, individuals have been prosecuted for counselling, aiding and abetting *another* in

failing to register, which is logically distinct from prosecuting one for facilitating his own failure to so register.

Every other Travel Act predicate offense (gambling, prostitution, bribery, etc.) involves affirmative conduct. In contrast, the court below has already found the predicate offense of failing to file the Customs form is purely and simply a crime of omission, not one involving affirmative acts of concealment. In this connection, see *United States v. Jenkins*, 689 F. Supp. at 343 ("The only crime is the failure to file a report at the time and place prescribed by the Secretary of the Treasury....") It is obvious that Congress only intended to punish conduct which made it difficult or impossible for another party to meet its reporting obligations, such as making false representations or destroying evidence. It could not have intended one to do it solely with himself, herself, or itself.

The Model Penal Code's treatment of "attempt" also supports the conclusion that one cannot attempt or facilitate his own crime of omission. Of all the offenses discussed in the "Attempt" section, none involve pure crimes of omission, while all are crimes involving affirmative conduct. In commentaries to Texas criminal law, it has been noted that one cannot act with the intention of committing a non-act. "Although attempt purports to be available for all offenses, it is improbable that a person will perform an act with intent to commit a crime of omission." *Gibbons v. State*, 634 S.W.2d 700, 705 (Tex. Crim. App. 1982).

British legal authorities have also observed that, where a crime of omission is involved, there cannot be attempt liability as a matter of law, specifically "a crime defined as an omission, where the *actus reus* does not include any consequence of the omission, as in the case of misprision of treason or some statutory offense of omission."

Smith & Hogan, *Criminal Law* at 267.[4] In the instant prosecution, the supposed attempt does not involve any consequence of actual crime.

To hold otherwise renders application of the Travel Act unconstitutional. All criminal statutes must be comprehensible. The Travel Act count here is not, as it is being used to punish actions taken to further non-action. How does one attempt *not* to do something? The concept is wholly meaningless. Moreover, by the Government's theory, the individual simply cannot gauge when his conduct has gone too far *not* doing something. Thus, he cannot try to avoid incriminating conduct because all conduct is equally consistent with both compliance ad non-compliance.

The Government's insistence in the district court that it could demonstrate petitioner's statement of future intentions is of no moment. As the Second Court itself has noted:

> All the government had was the belief that Jenkins would commit a crime *in the future*—i.e. that he would not report the money when the time came to do so. This is simply insufficient to create probable cause.
>
> *United States v. Jenkins*,
> 876 F.2d at 1089 (emphasis in original)

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[4] The *actus reus* might, in some cases, involve a consequence of the completed offense, such as, for example, a parent's failure to feed his child with intent to cause the latter's death there, the omission has some of the same consequences as the completed offense.

If this is legally insufficient to create probable cause, then, even assuming that the Government proved everything alleged in the indictment, it still remains legally insufficient to be an offense.

Moreover, even assuming, *arguendo*, that petitioner made unequivocal statements of his future intention not to file the requisite Customs form, he had yet to reach the point where renunciation is no longer possible. When he was arrested

> he still has a locus penitentiae and still remains within the region of innocent preparation. Until he has done his best to complete his guilty purpose, he has not attempted to complete it.
>
> *King v. Barker* (1924) N.Z.L.R. 865 (per Salmond, J.)[5]

Notwithstanding anything one may have said or done, when the duty to file actually arises, it is always possible simply to comply.

Thus, the Government's application of the Travel Act in the within indictment presents grave constitutional problems of vagueness, overbreadth, and lack of due process notice. *Lambert v. California*, 355 U.S. 225 (1957); and *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). It is black letter law that criminal statutes must be strictly construed, and, as such, requires that petitioner simply cannot be charged with an offense which has no precedent in the law, is clearly not what Congress intended or could have intended, is contrary to common law, and defies all logic and common sense.

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[5] Although the New Zealand Law reports may not be commonly cited in this Court, Justice Salmond's singular stature in all common law is no doubt known to it.

C. The Acceptance of the $150,000 Cannot as a Matter of Law Be a "Substantial Step" Toward Failure to File the Customs Form

Another basic flaw in the Government's theory is that it equated the acceptance of the $150,000 cash with an attempt to violate 31 U.S.C. 5316. As noted above, Count One charged that petitioner "did attempt to" promote, manage, establish, carry on and facilitate a violation of Section 5316 "by accepting approximately $150,000 in cash" from an FBI agent.

As the court below has often held, the elements of an attempt include the intent to commit the underlying crime and a "substantial step" toward commission of that crime. *United States v. Martinez*, 775 F.2d 31, 35 (2d Cir. 1985). A "substantial step" is defined as "some act adapted to, approximating, and which in the ordinary and likely course of things will result in the commission of the particular crime." *United States v. Mulholland*, 607 F.2d 1311, 1318 (10th Cir. 1979). *Accord, United States v. Manley*, 623 F.2d 978, 988 (2d Cir. 1980). Such a step must be "strongly corroborative" of criminal intent. *Id.*

Here, the Government specifically alleged below that the attempt not to file the form consisted of the acceptance of the cash from the agent. Yet, the mere receipt of money simply cannot be a substantial step toward violating Section 5316. It is innocent in and of itself, and not an act which ordinarily results in the commission of a crime, and especially not this crime. It is perfectly lawful both to receive cash and to transport it overseas. It is also perfectly consistent with an intention to declare the money. The mere receipt of the cash in question by petitioner is no more "strongly corroborative" of an intention not to declare it than the receipt of income on December 31st, in and of itself, is "strongly corroborative" of an intention not to file a tax return next April 15th, even if accompanied by a declaration that one intends not to pay taxes. The *locus penitentiae* still remains.

Indeed, far from being the act which brings the actor in dangerous proximity to commission of the crime, the receipt of the cash is really the very *first* possible event in a sequence of events which may eventually result in a duty to file. Under attempt analysis, it is impossible for petitioner to attempt not to file the requisite form before he even had possession of the funds. Physical possession is a bare minimum for the duty to report to exist. Yet, in this case, no sooner was possession transferred, than an arrest was made.

Even assuming, *arguendo*, that the Section 5316 predicate offense could be analogized to such crimes as tax evasion (which, as discussed above, involves affirmative acts of concealment, and thus can be attempted), the "substantial step" element cannot be satisfied. There must be some affirmative act of concealment, such as sewing the money into a coat lining, placing it in a lead container, bribing a Customs official to look the other way, filing false statements with a bank, breaking the money down into smaller denominations to make a unitary deposit appear to be several smaller ones, or other affirmative steps which are clearly contrived to make detection impossible or exceedingly difficult. There was no charge or proof below that any such acts took place here—it was only charged, and proved, that petitioner accepted the cash and placed it in an unlocked briefcase.

POINT TWO

THE GLASS-STEAGALL BANKING CHARGE FAILS TO STATE AN OFFENSE AS A GOVERNMENT AGENT CANNOT BE THE "OTHER" WITH WHOM PETITIONER WAS ALLEGEDLY ENGAGED IN A BANKING BUSINESS

A. In General

Count Two of the superseding indictment is the same as in the original indictment. In substance, it charges that petitioner's

acceptance of cash from a federal agent constituted "engaging [with others]... in the business of receiving deposits." The Government maintains this was unlawful under 12 U.S.C. 378 because the Afro-American Development Bank was not subject to regulation and examination by state and federal officials.

Accordingly, since the only parties to the alleged "transaction" were petitioner and the undercover agent, there was no offense under existing law, for the following reasons:

1. The Government is required to allege the existence of an actual bank, which it did not do. Its proof showed that there was no existing Afro-American Development Bank. The relationship of bank and depositor inherent in the transaction labelled as a "deposit' cannot exist in the absence of a real bank.

2. The use of funds to "establish" a bank, as alleged in the Government's complaint, clearly connotes the initial capitalization of some business, which is merely an investment and not a "deposit." Hence, by the Government's own allegations, there could be no "deposit" even if there were a bank, only an *investment* to establish a bank.

3. The money received by petitioner from the agent cannot be a "deposit" and the agent cannot be the "other" person with whom petitioner was allegedly engaged in the banking business. The reason is that the agent never had any intention of making a deposit.[6] The term "deposit," as used throughout the banking statute of which Section 378 is a part, refers to the intentional creation of the contractual relationship of debtor and creditor. Here, the Government has conceded that the supposed depositor is none other

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[6] The Government stipulated at an earlier hearing on December 21, 1989, that the agent in question was the only "other" person with whom petitioner was charged with having engaged in the business of receiving deposits.

than a federal agent, whose intention was only to make an arrest immediately after turning over cash. There was no allegation or proof that the said agent obtained any deposit slip or other evidence of indebtedness by which he could obtain repayment of his "deposit" upon proper demand, as the statute provides.

A government agent, under the circumstances of this case, simply cannot be a depositor as he does not truly possess contractual intent to enter into a debtor-creditor relationship, just as he cannot enter a criminal conspiracy because he does not truly enter the requisite conspiratorial agreement.

B. A "Deposit" Under the Banking Laws Requires the Mutual Intention to Create a Contractual Relationship

It is black-letter law that a "deposit" arises from a relationship involving a mutuality of intention between two parties—the depositor and the bank—to enter into an agreement. The parties must intend both to form a relationship, either as debtor and creditor, or as bailor and bailee. *See, generally*, Natter, et al., Banking Law, Vol. I, Sec. 9.02[4] (1989). "A [general] bank deposit is a contractual arrangement, express or implied, in which the creditor-debtor relationship of the depositor and bank arises upon the making of the deposit." *Id.* Sec. 9.02[4], p. 9-8 (1989).[7] In order to create the relationship of depositor and banker, the *consent* of the depositor is needed." *Id.* Sec. 9.04, p. 9-16. (emphasis added). "A relationship between a depositor and a bank must be based upon a *contract*... between the depositor and the bank." *Id.*, Sec. 9.05, p. 9-19. (emphasis added)[8]

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[7] In the case of "special deposits," where title remains in the depositor, "the relationship... is that of bailor and bailee." *Id.*, Sec. 9.05, p. 9-24

[8] The creditor-debtor relationship is created "when the bank receives money from the depositor and credits the depositor's account on its books." *Id.*, Sec. 9.05, p. 9-20. "[A]s soon as the money is deposited, it is deemed to be the property of

In the present case, the alleged depositor clearly had no intention of creating the necessary relationship with petitioner. In giving the latter the cash, the agent obviously did not intend that petitioner actually credit it to some account in a bank. His intention was only to use the transfer as a device to arrest petitioner on the spot. Indeed, this motive was admitted by the Government at the first suppression hearing under this indictment. It is axiomatic that there can be no conspiracy solely between a criminal defendant and an undercover agent or informant. *See, Brown v. United States*, 367 F.2d 145 (5th Cir. 1966), *cert. den.*, 387 U.S. 947 (1966) (conviction cannot stand if only government agents were co-conspirators); *Sears v. United States*, 343 F.2d 139 (5th Cir. 1965) (as it takes to conspire, there can be no conspiracy when one does not so intend). Thus, a government agent who secretly intends to frustrate the agreement cannot be include in an actionable conspiracy.

POINT THREE

THE FAILURE OF PETITIONER'S TRIAL COUNSEL TO DISCLOSE THE EXISTENCE OF HIS PENDING APPLICATION FOR EMPLOYMENT CONSTITUTED AN IMPERMISSIBLE CONFLICT WHICH WAS NOT PROPERLY OR TIMELY WAIVED

A. Statement of Facts

From the time of his arrest in 1987, petitioner was represented by Samuel Abady, Esq., who entered his appearance on May 6, 1988. App. at 15. At no time prior to the middle of April, 1990, did he know that Mr. Abady had an employment application pending with

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(cont'd) the bank, and the relationship between the bank and the depositor is that of debtor and creditor." *Id.*, Sec. 9.05, p. 9-22.

the United States Attorney for the Southern District of New York. This fact was first revealed when the Government, on April 12, 1990, sent a letter to an earlier trial judge with a copy to the actual trial judge, informing them thereof.

In view of the contents of said letter, the trial court, on April 18, 1990, two weeks before the commencement of trial, conducted a brief inquiry in open court with petitioner and all counsel. App. at 16. At that time, petitioner was asked by the court whether he had ever seen the letter of April 12th, and replied that he had not. Mr. Abady, at sentencing on July 26, 1990, conceded that he had not mentioned anything about the pending application until the evening of April 17th, the night before the aforesaid inquiry.

When the trial court interrogated petitioner about the "possible conflict" created by Mr. Abady's application, he asked him whether he had "weighed that...carefully in your mind?" App. at 17, petitioner then responded, "Oh, I found out about it yesterday and I prayed about it all night." *Ibid.* The court then asked a few questions as to whether petitioner understood "clearly what is going on here?" and the latter answered, "I believe I do." App. at 18. He then answered "Yes I do," to the judge's question, "Do you wish to continue to be represented by Mr. Abady in these proceedings." *Ibid.*

The Government was not satisfied with the court's inquiry and, referring to *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), stated that this Court had "pointed out that the court's inquiry in each instance of a potential conflict of interest should take place after the defendant has had a reasonable time to digest and contemplate the risks posed by the conflict." The court responded that petitioner had had "the last 24 hours and that he himself is an attorney," and that there was no need for further time for consideration by him.

The fact of the matter is that, although petitioner was indeed an attorney, he has rarely practiced law. Admitted to the bar in 1974, he spent a few months in the Queens County District Attorney's

Office before becoming Deputy Commissioner of Buildings, a post he retained until 1978 when he successfully ran for the New York State Assembly. He was sworn in as an Assemblyman in January of 1979, and had been in the State Legislature ever since. Although he has been a member of a law firm, his participation in its actual practice was solely to refer clients to it.

Argument

A. Trial Counsel's Pending Application For Employment by the Very Office Which Was Prosecuting Petitioner Created an Impermissible Conflict of Interest

In Rule 44(c), FRCrP, provision has been made for preventing conflicts of interests where joint defendants are represented by the same counsel or by counsel "who are associated in the practice of law..." In those situation, "[U]nless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

The same considerations clearly apply when a criminal defendant suddenly is informed, virtually on the eve of a trial, after two-and-a-half years of representation, that his attorney has an employment application pending with his prosecutor's office. In this case, Mr. Abady did not inform petitioner until the night before the court's inquiry and, as Mr. Abady stated at sentencing, he had notified the Assistant United States Attorney before he had even told his own client.

In actuality, it was just prior to a pre-trial conference on April 5, 1990, that Mr. Abady, apparently off the record, advised the Government that he had applied for a position with the United States Attorney's Office. During the said conference, he then advised the trial judge, again apparently off the record, that (i) he had applied for such a position; (ii) his application was being held and would not

be acted upon until after the completion of the trial, (iii) he had fully advised petitioner of the pending application; and (iv) petitioner had stated that he had no objection to Mr. Abady continuing to represent him. In reality, Mr. Abady had, by his later admissions, misrepresented to the court below with reference to (iii) and (iv) above, in that he had not advised petitioner of the pending application until the evening of April 17th, and that petitioner had not indicated to him that he had no objection to his continued representation.

Following the April 12th pre-trial conference, the Government wrote to the trial judge, confirming Mr. Abady's representations and requesting a waiver hearing consistent with the requirements of *Untied States v. Curcio*, 680 F.2d 881, 888-890 (2d Cir. 1982). This letter generated the April 18th hearing before District Judge Metzner, which resulted in the alleged waiver, upon which the Government and the court below relied.

No citation of authority is required to establish that the application of a defense attorney for a position with the prosecutor's office constitutes a conflict of interest. This was clearly understood by the prosecutor who immediately applied for a *Curcio* hearing.

B. The Trial Court Conducted A Wholly Inadequate Curcio Hearing

The Second Circuit's Standard for determining whether a waiver of an attorney-client conflict of interest was "voluntary, knowing, and intelligent" was set forth in *United States v. Curcio*, 680 F.2d 881, 888-890 (2d Cir. 1982), and recently followed in *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986), and *United States v. Friedman*, 854 F.2d 635 (2d Cir. 1988). This Court emphasized that, in order to insure that a waiver was valid, the trial judge should:

> (i) advise defendant of the dangers arising from a particular conflict of interest; (ii) determine through questions that are likely to be answered

> in narrative form whether defendant understands those risks and freely chooses to run them; and (iii) give defendant time to digest and contemplate the risks after encouraging him to seek advise from independent counsel.
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> *United States v. Iorizzo*, 786 F.2d at 59 (citing *United States v. Curcio*, 680 F.2d at 888-890).

In the present case, the trial judge conducted none of the steps required under *Curcio*, as justifiably feared by the prosecutor during the hearing of April 18th. A.40-41. He did not "advise the [petitioner] of the dangers arising from a particular conflict of interest," "did not determine through questions that are likely to be answered in the narrative form whether [petitioner] understands these risks and freely chose to run them," and did not "give sufficient time to digest and contemplate the risks after encouraging [petitioner] to seek advice from an independent counsel." *United States v. Iorizzo, Supra*, at 59.

At most, petitioner was given the most perfunctory of interrogation and instructions by the trial court which did not (i) advise him of the dangers involved; (ii) did not ask questions "likely to be answered in the narrative form" as to his understanding of those dangers; and (iii) did not encourage petitioner "to seek advice from independent counsel."[9] It is relied solely and exclusively upon the fact that he was an attorney, without even inquiring as to the extent of his experience in that profession, particularly in the area of the criminal law. As has been demonstrated above, he was never an attorney in the practical sense of the term, but had spent his entire

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[9] Significantly, the court did not inform petitioner that, if he desired to employ new counsel, his trial would be delayed sufficiently in order for his successor attorney to be fully prepared.

professional life, except for a few months after admission in the Queens County District Attorney's Office, in political positions which were totally unrelated to the practice of law.

It is obvious that petitioner's trial counsel hid the existence of his employment application from him, not even bothering to inform him of it until the evening before the *Curcio* hearing, and then only by telephone.[10] There was no real discussion of the matter between attorney and client, and it was the Government, and not Mr. Abady, which finally alerted the trial judge to the matter. Thus, petitioner was confronted with the prospect of notification of the conflict two weeks before trial by an attorney who had represented him in the same litigation for two-and-a-half years and who had been paid substantial fees. Small wonder that he "prayed about it all night." There are few parallel cases in the jurisprudence with reference to the instant fact situation. In *Edwards v. Arizona*, 451 U.S. 477, 482 (1981), (quoting *Johnson v. Zerbst*, 304, U.S. 458, 464 (1938) ("waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'"

The nearest example counsel was able to find occurred in *United States v. Horton*, 845 F.2d 1414 (7th Cir. 1988), where the defendant's attorney, who was appointed to represent him in a federal drug trial, was revealed publicly, one week later, to be one of the four finalists being considered for the position of United States Attorney for the Western District of Wisconsin. Although the court stated that, even if Horton's contention that a conflict of interest did in fact exist was valid, "there is no indication that either the

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[10] Petitioner was not even shown a copy of the Government's letter to the trial judge, revealing the conflict of interest.

magistrate of Horton himself was aware of [his attorney's] position as a finalist for the United States attorney," 845 F.2d at 1419.

However, it did stress that "[W]here a conflict on interest provides the predicate for an ineffective assistance claim...a defendant bears a lighter burden with regard to demonstrating prejudice." *Id.* at 1418. *Walberg v. Israel*, 766 F.2d 1071, 1075 (7th Cir. 1985), *cert. den.* 474 U.S. 1013; *United States v. Marrera*, 768 F.2d 201, 205 (7th Cir. 1985), *cert. den.* 475 U.S. 1020 (1986). Moreover, when the trial court has notice of the alleged conflict and fails adequately to inquire into it , a reviewing court will assume prejudice upon a showing of possible prejudice. *Holloway v. Arkansas*, 435 U.S. 475, 484-91 (1978).[11]

In *United States v. Friedman*, 854 F.2d 535 , 574 (2d Cir. 1988), this Court pointedly reminded us that:

> In *Curcio*, we established procedures to be followed by trial courts in determining whether a criminal defendant has knowingly and intelligently chosen to waive his right to be represented by an attorney who is free from conflicts of interest. We noted that the "first task of the trial court is to alert the defendants to the

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[11] In considering possible prejudice, as well as whether petitioner received the effective assistance of counsel, pursuant to *Strickland v. Washington*, 466 U.S. 688 (1984), this Court should, in present counsel's opinion, take into consideration the trial attorney's failure to (a) show petitioner the superseding indictment; (b) reveal his conflict of interest until almost the eve of trial; (c) show petitioner the Government's letter to the trial judge exposing the said conflict of interest; (d) execute the stipulation necessary to permit special counsel to present and argue a motion for a new trial based on the said conflict of interest; (e) file a motion to dismiss the superseding indictment before and trial; and (f) cooperate with appellate counsel with reference to the files in his possession despite the Court's statement that it would appreciate such cooperation.

> substance of the dangers of representation by an attorney of divided loyalties in as much detail as the court's experience and its knowledge of the case will permit." *Id.* at 888. We stated that the court must then "assess whether the [defendant's] request is...knowing and intelligent," *id.*, and that "the court may perhaps devise a variety of methods for gaining the necessary insights." *Id.* at 889. Nevertheless, analogizing to Fed. R. Crim. P. 11, he observed that "questions designed to elicit from the defendant a narrative statement of [the defendant's] understanding [is] preferable to questions designed to elicit mere 'yes' or 'no' answers." *Id.* We also noted that "the court's inquiry should take place after the defendant[s] ha[s] had a reasonable time to digest and contemplate the risks posed by [the conflict of interest]" *Id.*

In finding that the *Curcio* "catechism" had been met in *Friedman*, the Circuit pointed out, first, that Friedman had had "ample time" to "digest and contemplate" the risk posed by the conflict in question. Secondly, he had "consulted with independent counsel." Lastly, he was a lawyer who had devoted "hundreds of hours to the preparation of his defense." 854 F.2d at 574. Here, outside of the fact that petitioner was a non-practicing attorney, none of the *Friedman* findings pertain.[12] As the court below stated in that case, "We emphasize, however, that departures from the procedures outlined

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[12] It might be pointed out that Friedman had vigorously opposed a motion by the Government to disqualify his attorney because at least one prosecution witness had been represented said attorney's law firm, the very conflict of interest raised by him on appeal. 854 F.2d at 572.

in *Curcio* and *Iorizzo* may be justified only in unusual circumstances, such as those in the instant case." *Id.*

Petitioner's case does not present those "unusual circumstances" and the *Curcio* departures set forth above cannot possibly be justified.

CONCLUSION

Petitioner respectfully prays that the within Petition be granted.

Respectfully submitted,

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November 7, 1991

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 939—August Term, 1990

(Argued: March 19, 1991 Decided: August 13, 1991)

Docket No. 90-1494

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANDREW JENKINS,

Defendant-Appellant.

Before:

MESKILL, MINER and ALTIMARI,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, (Charles M. Metzner, *Judge*), convicting defendant of violating the Travel Act, 18 U.S.C. § 1952(a), and the Glass-Steagall Act, 12 U.S.C. § 378.

Affirmed.

WILLIAM M. KUNSTLER, New York, New York (Ronald L. Kuby, New York, New York, of counsel), *for Defendant-Appellant*.

STEVEN A. STANDIFORD, Assistant United States Attorney, Southern District of New York (Otto G. Obermaier, United States Attorney, Jeh C. Johnson, Debra Ann Livingston, Assistant United States Attorneys, Southern District of New York, of counsel), *for Appellee*.

ALTIMARI, *Circuit Judge*:

Defendant-appellant Andrew Jenkins appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York (Charles M. Metzner, *Judge*). In a two-count superseding indictment, Jenkins was charged with violating 18 U.S.C. § 1952(a) (1988) ("Travel Act"), and 12 U.S.C. § 378 (1988) ("Glass-Steagall Act"). Specifically, Count I alleged that Jenkins had used and caused to be used facilities of interstate and foreign commerce, including the telephone, with the intent to promote, manage, establish and carry on money laundering activities in violation of 31 U.S.C. §§ 5316(a) and 5322. *See* 18 U.S.C. § 1952(a) & (b). Count II charged that Jenkins had engaged in the business of receiving bank deposits without proper authorization under federal and state law. *See* 12 U.S.C. § 378. After a jury trial, Jenkins was convicted on both counts.

On appeal, Jenkins challenges his conviction, contending that the indictment failed to set forth a legally cogni-

zable Travel Act violation. Jenkins also argues that, for a variety of reasons, the government failed to establish that he accepted an actual bank deposit in violation of the Glass-Steagall Act. Finally, Jenkins asserts that, in violation of the Sixth Amendment, he was represented by counsel who labored under a conflict of interest.

For the reasons stated below, we affirm the judgment of conviction on both the Travel Act and Glass-Steagall Act counts.

BACKGROUND

The present case arises out of a money laundering investigation conducted by the Federal Bureau of Investigation ("FBI"). From June 5 to August 1, 1987, New York State Senator Andrew Jenkins had a series of meetings with a man he believed to be "Dan Garth," a Texas businessman. Jenkins' introduction to Garth was arranged by Louis Moore, a Jenkins acquaintance who was operating as a government informant. Moore had told Jenkins that Garth and his associates had some cash that they wanted to "clean up" and suggested that Jenkins and Garth meet. Unbeknownst to Jenkins, Dan Garth was actually an FBI undercover agent, named David Maniquis, who was surreptitiously tape recording their meetings. Those tapes ultimately formed a large portion ~~of~~ the body of evidence introduced against Jenkins at trial.

The first meeting between Jenkins and Maniquis occurred on June 5, 1987. During that meeting, Maniquis explained his situation as follows:

> We're in a position now where we have a lotta cash at our disposal, but we're in a situation where we

> can't use it the way it is. You know without going into detail . . . . I'm always trying to find other people who could possibly, who have companies, investment opportunities where we can move around some of this money so that when it comes back to us, we can use it.

Further, Maniquis stated: "we're trying to find some creative ways . . . in moving some of this money around so that when [ ] it comes back to us . . . we can account for why we have it." Maniquis then mentioned that he had heard that Jenkins had "some banking contacts where we could [ ] possibly set something up." Eventually, Jenkins suggested, among other things, that a bank he owned in Africa might be of some use and observed that "[b]anks abroad don't question where you get your money." At the conclusion of the meeting, Jenkins said that "given a little time I could come up with a good something on this."

On June 26, Jenkins and Maniquis met again. At this meeting, Jenkins essentially proposed that Maniquis funnel $150,000 to Jenkins' bank in Zaire (subsequently identified as the "Afro-American Development Bank"). According to Jenkins, this money would allow the bank "to settle some debts and deposits" and, as a result, obtain a $50 million letter of credit from the Central Bank of Zaire. Once the letter of credit was obtained, the bank would be in a position to finance a lumber operation. Further, Maniquis would then begin the delivery of additional sums of money. Presumably, Maniquis' money would be returned in the guise of income from the lumber operation. It thus would look as if the money was nothing more than profits earned through investing in a highly speculative venture.

Jenkins also assured Maniquis that his money would not be at risk and that it would be returned within one year.

The conversation eventually turned to the means by which the money would be transported from the United States to Zaire. Maniquis indicated that he was reluctant to use a wire transfer since it would create a record. Jenkins therefore proposed that he either personally deliver the money or send it by diplomatic pouch. According to Jenkins, Zaire customs agents do not inspect diplomatic pouches when they enter the country. Similarly, Jenkins stated that because he was a State Senator he was routinely admitted into Zaire without his luggage being searched. Jenkins also noted that "[m]oney doesn't show up on the X-ray." Eventually, the parties agreed that Jenkins would personally carry the money to Zaire.

Following the June 26th meeting, Jenkins directed his secretary, Barbara Washington, to make travel arrangements for a trip to Zaire. Accordingly, Washington used the telephone to make a reservation for Jenkins on a Sabena World Airways flight that was scheduled to leave New York on August 1 and, after a six to eight hour lay-over in Belgium, arrive in Zaire on August 3. Washington also booked Jenkins on a flight that would return to New York on August 9.

Further details of the plan were discussed when Jenkins and Maniquis again met on July 25th. Jenkins now identified the Afro-American Bank as the institution in which Maniquis' money would be deposited and revealed that he controlled fifty percent of the bank's stock. Jenkins again guaranteed that Maniquis' money would not be at risk and that he could reclaim it whenever he desired. Further, Jenkins continued to assure

Maniquis that he would be able to carry the $150,000 into Zaire without any difficulties. At this point, referring to the federal statute prohibiting the transportation of more than $10,000 outside the United States without filing a Currency or Monetary Instrument Report ("CMIR"), *see* 31 U.S.C. § 5316(a), Maniquis asked Jenkins what he intended to do about the "Customs form you're supposed to fill out, if you're bringing a certain amount of money out of the [United States]." Jenkins was apparently unaware of the requirement and told Maniquis that he would "check that out."

On July 31, the day before Jenkins was scheduled to depart for Zaire, he and Maniquis had yet another meeting. Jenkins now showed Maniquis the Afro-American Bank's charter, the minutes of an incorporation meeting and a document demonstrating that the bank already had substantial funds on deposit. The conversation eventually turned to a discussion of how Jenkins intended to avoid disclosing that he was transporting $150,000 in cash outside the United States. Although Jenkins stated that "I will never ever say I'm gonna break the law," he nonetheless repeatedly assured Maniquis that a CMIR would not be filed and that the cash would not be discovered. Indeed, Jenkins indicated that he fully understood that filing a CMIR would defeat the purpose of the scheme and guaranteed that he would not fill out the form, even if confronted by a customs agent. Finally, Jenkins and Maniquis agreed to meet the following morning at the Plaza Hotel in Manhattan. At that time, Maniquis was to give $150,000 in cash to Jenkins, who would then proceed to the airport where he would commence his journey to Zaire.

As agreed, Jenkins and Maniquis met at a restaurant in the Plaza Hotel on the morning of August 1. Maniquis handed over a soft leather briefcase containing $150,000 in cash. Jenkins took the briefcase and placed it within his larger briefcase. Shortly thereafter, as he was leaving the restaurant, Jenkins was arrested. At the time of the arrest, Jenkins was carrying the briefcase with the $150,000. The arresting officers also found that the briefcase contained Jenkins' passport with a current visa to Zaire, a round-trip airline ticket to Zaire and a document showing that Jenkins had obtained the vaccinations necessary for travel to Zaire.

On September 29, 1987, a grand jury handed down a two-count indictment against Jenkins. Count I charged that Jenkins was "about to transport monetary instruments of more than $10,000" from New York to Zaire without filing the customs form required by 31 U.S.C. § 5316(a). *See* 18 U.S.C. § 1952(a). Count II charged that Jenkins, while acting as a principal and agent of the "Afro-American Development Bank of Zaire," engaged in the business of receiving deposits without proper authorization under federal and state law, in violation of the Glass-Steagall Act. *See* 12 U.S.C. § 378(a)(2).

Jenkins subsequently filed a motion to dismiss Count I of the indictment, arguing that he had no duty to file the customs form before arriving at the airport. The district court agreed and therefore dismissed Count I. *See United States v. Jenkins*, 689 F. Supp. 342, 344 (S.D.N.Y. 1988). In addition, Jenkins sought to suppress the evidence seized from his briefcase at the time of his arrest. The district court ruled that, although it was permissible for the government to retrieve the sting money, there was no legitimate ground to seize the other

evidence contained in the suitcase. While the government did not challenge the dismissal of Count I, it did appeal the district court's suppression ruling. We reversed and remanded for a hearing to determine whether the documents in question were legitimately seized under the plain view exception to the Fourth Amendment warrant requirement. *See United States v. Jenkins*, 876 F.2d 1085, 1088 (2d Cir. 1989) (per curiam). On remand, the district court conducted an evidentiary hearing and held that there was no need to suppress Jenkins' passport, vaccination card and airline tickets. The district judge, however, suppressed certain bank records that were discovered within a manila folder inside Jenkins' briefcase.

On December 14, 1989, a two-count superseding indictment was filed against Jenkins. Count I now charged that in violation of the Travel Act, 18 U.S.C. § 1952(a), Jenkins had used and caused to be used facilities of interstate and foreign commerce with the intent to promote, manage, establish and carry on money laundering activities, *i.e.*, transportation in excess of $10,000 from the United States without filing a CMIR as required by 31 U.S.C. §§ 5316 and 5322. Count II of the superseding indictment was identical to Count II of the original indictment.

At trial, the parties stipulated that:

> (A) At no time was an entity called the Afro-American Development Bank incorporated under the laws of the United States or New York State. Furthermore, at no time were Andrew Jenkins or an entity called the Afro-American Development Bank authorized or permitted by state or federal law to engage in receiving deposits;

(B) Neither Andrew Jenkins nor an entity called the Afro-American Development Bank was subjected by the law of the United States or the State of New York to examination and regulation; nor did

(C) Andrew Jenkins or an entity called the Afro-American Development Bank submit to periodic examination by the banking authorities of New York State or make and publish periodic reports.

Jenkins was tried before Judge Metzner and a jury, and was convicted on both the Glass-Steagall and Travel Act charges.

Following his conviction, Jenkins filed a post-trial motion to arrest judgment or to set aside the verdict and enter a judgment of acquittal. *See* Fed. R. Crim. P. 29(c) & 34. In a written opinion, Judge Metzner denied the motion. Thereafter, Jenkins obtained new counsel and moved for a new trial on the ground of an alleged conflict of interest between Jenkins and his trial counsel. *See* Fed. R. Crim. P. 33. Judge Metzner also denied this motion. Jenkins was ultimately sentenced to concurrent terms of one year and one day imprisonment on each count and to a $50 special assessment on each count.

This appeal followed.

DISCUSSION

1. *Count I—The Travel Act*

The Travel Act is violated when (1) a person uses a facility of interstate or foreign commerce, such as the telephone, (2) with intent to "facilitate the promotion, management, establishment, or carrying on, of any unlawful activity" and (3) thereafter performs an addi-

tional act in furtherance of the specified unlawful activity. 18 U.S.C. § 1952(a); *see United States v. Harris*, 903 F.2d 770, 773 (10th Cir. 1990); *United States v. Biaggi*, 853 F.2d 89, 101 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *United States v. Walsh*, 700 F.2d 846, 852-53 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983). The "unlawful activity" at issue in the present case is transporting in excess of $10,000 from the United States without filing a CMIR as required by 31 U.S.C. §§ 5316 and 5322. *See* 18 U.S.C. § 1952(b)(i)(3).

At trial, the government satisfied the elements of the Travel Act by proving that Jenkins (1) intended to engage in an unlawful activity, namely transporting $150,000 outside the United States without filing a CMIR; (2) caused his secretary, Barbara Washington, to use the telephone to make travel arrangements to Zaire, thus facilitating the unlawful activity; and thereafter (3) performed an additional facilitating act by accepting $150,000 in cash from Maniquis.

Despite the foregoing, Jenkins now argues that the Travel Act violation charged in Count I of the superseding indictment failed to set forth a legally cognizable offense. Specifically, Jenkins contends that the Travel Act sets forth a crime of attempt, *i.e.*, that he was essentially charged with attempting to "transport . . . monetary instruments of more than $10,000 . . . from a place in the United States to . . . a place outside the United States" without filing a CMIR. 31 U.S.C. § 5316. From this premise, Jenkins asserts that his conviction must be reversed because "there is no such crime as attempting to cause one's own crime of omission" and "Congress did not intend to create a crime of

attempting or facilitating one's own omission of filing the requisite customs form." We disagree.

Jenkins was not charged with "attempting" to transport in excess of $10,000 from the United States without filing a CMIR. He was charged with violating the Travel Act. The nature and elements of the Travel Act are plainly distinct from the crime of attempt. The Travel Act is a substantive offense that in-and-of-itself punishes individuals for using facilities of interstate or foreign commerce to further certain unlawful activities. *Cf. Erlenbaugh v. United States*, 409 U.S. 239, 246 (1972); *United States v. Teplin*, 775 F.2d 1261, 1265 (4th Cir. 1985). In contrast, the crime of attempt is an inchoate offense that provides a means of punishing individuals who have sufficiently manifested their intent to commit a particular substantive offense yet have failed to consummate the crime. *See United States v. Stallworth*, 543 F.2d 1038, 1040-41 (2d Cir. 1976); W. LaFave & A. Scott, Criminal Law § 6.2(b), at 498-500 (2d ed. 1986); *see, e.g.*, Model Penal Code § 5.01(1)(c) & 2 (Proposed Official Draft 1962); N.Y. Penal Law § 110.00 (McKinney 1987). Unlike the crime of attempt, the Travel Act does not require that the government establish that the accused took a substantial step in furtherance of the intended unlawful activity. Rather, as discussed above, to establish a Travel Act violation the government must prove that the defendant used a facility of interstate or foreign commerce to "make easier or facilitate" the intended unlawful activity, and thereafter did one additional act in furtherance of the unlawful activity. *United States v. Smith*, 789 F.2d 196, 203 (3rd Cir.), *cert. denied*, 479 U.S. 1017 (1986); *accord United States v. Rogers*, 788 F.2d 1472, 1476 (11th Cir. 1986); *United States v. Davis*, 780 F.2d 838, 843 (10th Cir. 1985); *see*

also Harris, 903 F.2d at 773 (likening the necessary proof to an overt act); *United States v. Stafford*, 831 F.2d 1479, 1483 (9th Cir. 1987) (same). Accordingly, Jenkins' characterization of Count I of the indictment as an attempt charge is mistaken and the argument flowing from that faulty premise is without merit.

We also note that Jenkins is in error when he maintains that Congress did not intend to permit the government to predicate a Travel Act violation on the failure to file a CMIR. Congress specifically amended the Travel Act to include, *inter alia*, the transportation of currency outside the United States without filing a CMIR in violation of 31 U.S.C. §§ 5316(a) and 5322. As the government points out, this expansion of section 1952 provides authoritative evidence that Congress intended to prohibit the use of telephone facilities in connection with the illegal export of United States currency.

2. *Count II—The Glass-Steagall Act*

Jenkins was convicted of violating the Glass-Steagall Act by engaging "in the business of receiving *deposits* subject to . . . repayment" without proper state or federal authorization. 12 U.S.C. § 378(a)(2) (emphasis added). On appeal, Jenkins claims that this conviction must be reversed because the government failed to establish that the $150,000 he received was a "deposit." Jenkins grounds his argument on the following assertions: (1) the government failed to prove that an actual bank existed into which a deposit could be made; (2) the evidence at trial indicated that the $150,000 received from Maniquis was to be used as start-up capital for the Afro-American Bank—not as a deposit in the bank; and (3) the depositor was an undercover FBI agent who had

no intention of making an actual deposit. We consider and reject each of these assertions in turn.

First, Jenkins asserts that the government failed to establish that a bank actually existed. Simply stated, the plain language of section 378(a)(2) does not require the government to prove the existence of an actual bank in order to obtain a conviction. Indeed, such an interpretation of the statute would permit individuals, who either mistakenly or deceitfully profess to represent banks, to accept deposits and then evade the reach of section 378(a)(2). Clearly, such was not the intent of Congress when it passed this landmark legislation. Accordingly, we are convinced that section 378(a)(2) prohibits any entity that claims to be a bank, or any person who purports to represent a bank, from engaging in the business of receiving deposits without proper authorization—regardless of whether an actual bank exists.

Second, Jenkins maintains that the evidence established that the $150,000 he received from Maniquis was an investment, rather than a deposit, in the Afro-American Bank. In other words, he contends that there was insufficient evidence to support the jury's finding that the $150,000 was a bank deposit. Reviewing this claim, we bear in mind that "[a] conviction must be allowed to stand if, 'after viewing the evidence in the light most favorable to the prosecution,' the reviewing court finds that '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)), *cert. denied*, 110 S. Ct. 1138 (1990). Further, we are required to "examine the evidence . . . in its entirety and credit

all reasonable inferences that can be drawn in favor of the prosecution." *United States v. Coonan*, No. 90-1223, slip op. at 6366 (2d Cir. July 16, 1991).

As commonly understood, the term "deposit" means a sum of money placed in the custody of a bank, to be withdrawn at the will of the depositor. *See* 5A Michie on Banks and Banking, Ch. 9, § 3, at 23 (1983); Black's Law Dictionary 395 (5th ed. 1979). Here, the tape recorded conversations between Jenkins and Maniquis provide ample support for the jury's finding that the $150,000 was a deposit. For example, Jenkins stated that, once the bank received Maniquis' $150,000, "[y]our money will be here for your use." Further, in sharp contrast to investment in a new banking venture, Jenkins repeatedly assured Maniquis that his money would not be at risk. Jenkins also told Maniquis that the Afro-American Bank was in existence and showed Maniquis documents demonstrating this fact. Such conduct is clearly inconsistent with Jenkins' suggestion that the $150,000 was accepted as financing which would be used to establish a bank. In sum, we find that the evidence fully supports the jury's verdict.

Jenkins' third assertion focuses on the intentions of Agent Maniquis when he delivered the $150,000. Specifically, Jenkins argues that the money cannot be considered a deposit because the depositor was an FBI undercover agent who did not possess an actual intent to enter into a debtor-creditor relationship. We think that this argument is overly technical and ignores the plain meaning of the statute. The Glass-Steagall Act makes it unlawful for a "person . . . to engage, to any extent whatever . . . in the business of receiving deposits." 12 U.S.C. § 378(a)(2). As the above analysis demonstrates,

Jenkins took custody of the money on behalf of the Afro-American Bank and agreed to return it at the will of Maniquis. Simply put, he accepted a deposit. We fail to see how this essential fact is in any way undermined by what Jenkins now describes as Maniquis' actual intention.

In light of the foregoing, we are convinced that Jenkins was impermissibly engaging in the business of receiving deposits and therefore was properly convicted of violating the Glass-Steagall Act.

3. *Defense Counsel's Conflict of Interest*

Jenkins next argues that reversal of his conviction is warranted because at the time of trial his counsel, Samuel Abady, had an application pending for a position with the U.S. Attorney's Office for the Southern District of New York, *i.e.*, the office that was prosecuting Jenkins. The government does not dispute that Abady's pending application created a potential conflict of interest. Instead, the government stresses that prior to trial Jenkins was notified of Abady's pending application, decided to proceed with Abady as his counsel and specifically waived the potential conflict. Although Jenkins admits that he did agree to proceed with Abady, he now asserts that his waiver was not knowing and intelligent. We disagree.

The facts relevant to this dispute are as follows. On May 6, 1988, Samuel Abady entered his appearance on behalf of Jenkins. On March 22, 1990, Abady applied for a position with the U.S. Attorney's Office for the Southern District of New York. At a pretrial conference on April 5, Abady apparently advised the court and the government of his pending application. Further, Abady

explained that the application would be held in abeyance at least until completion of Jenkins' trial. On April 18, approximately two weeks before the commencement of the trial, a hearing on the potential conflict was held before District Judge Metzner. During the course of the hearing, the district judge engaged in the following colloquy with Jenkins and Abady:

COURT: Do you know why you're here?

JENKINS: Yes, sir.

COURT: Why?

JENKINS: Mr. Samuel Abady, my attorney in this matter, has made an application to the U.S. Attorney's Office for a job . . . .

* * *

COURT: Mr. Abady, have you discussed the contents of this letter [from the government to the court detailing the potential conflict of interest] with your client?

ABADY: I have, your honor. Forgive me that I didn't show it to him, but I described it to him in detail.

COURT: Did you tell him that in view of the fact that you are trying to obtain a favor from the U.S. Attorney's Office there might be some conflict of interest in your representing him as a defendant in this court?

ABADY: If your Honor wishes to characterize it as a favor. I did tell him it was [the government's] position that my application—the mere presentation of a

written application [—] could constitute such a conflict, and I was therefore obliged to apprise him of that and I did so.

COURT: Mr. Jenkins, do you understand that Mr. Abady has made this application?

JENKINS: Yes, I do.

COURT: Do you understand that potentially it could involve a conflict of interest in representing you because in representing you he must exert his best efforts to defend you, but at the same time he is asking to be employed by the prosecution, which could present a conflict of interest? Do you understand that?

JENKINS: Yes, I understand that.

COURT: [H]ave you weighed that possible conflict carefully in your mind?

JENKINS: Oh, I found out about it yesterday and I prayed about it all night.

COURT: Do you wish any time to consult with another attorney as to what your answer should be?

JENKINS: No.

COURT: What is your educational background?

JENKINS: I am a[n] attorney by profession.

COURT: You are an attorney?

JENKINS: Yes, I am. I am a graduate of Fordham University.

COURT: You understand clearly what is going on here?

JENKINS: I believe I do.

COURT: You have indicated you have carefully weighed this problem in your mind and do you wish to continue to be represented by Mr. Abady in these proceedings?

JENKINS: Yes, I do.

As a result of the foregoing, Abady was permitted to proceed as Jenkins' counsel. After trial, having obtained new counsel, Jenkins moved for a new trial on the ground that Abady had labored under a conflict of interest that had not been properly waived. The district court denied the motion.

There is no dispute that "a criminal defendant has an absolute right under the Sixth Amendment to be represented by an attorney who has no conflict of interest." *United States v. Curcio*, 680 F.2d 881, 885 (2d Cir. 1982) (citing *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978) and *Glasser v. United States*, 315 U.S. 60, 70 (1942)). We have recognized, however, that "the effect of the Sixth Amendment guarantee is to grant a right, not to impose an obligation." *Curcio*, 680 F.2d at 885; *see Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) ("What were contrived as protections for the accused should not be turned into fetters."). Consequently, a defendant is permitted to waive the right to proceed with conflict-free counsel.

In seeking to assure that such waivers are knowing and intelligent, we have instructed that trial courts should:

> advise the defendant of his right to . . . conflict-free representation, instruct the defendant as to problems inherent in being represented by an attorney with divided loyalties, allow the defendant to confer with his chosen counsel, encourage the defendant to seek advice from independent counsel, and allow a reasonable time for the defendant to make his decision.

Curcio, 680 F.2d at 890; *see also United States v. Friedman*, 854 F.2d 535, 573-74 (2d Cir. 1988). Transcending these prescriptions, however, is the common sense notion that the existence of a knowing and intelligent waiver inevitably depends "upon the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the accused." *Friedman*, 854 F.2d at 574 (quoting *Curcio*, 680 F.2d at 888) (citations & internal quotation marks omitted). As we intimated in *United States v. Friedman*, 854 F.2d at 574, the scope and breadth of the district court's inquiry will necessarily reflect the sophistication, intelligence and comprehension of the particular defendant. Thus, in considering if a defendant's waiver was adequate, we are more concerned with whether the defendant appreciated his predicament and made a properly informed choice than we are with whether the trial judge recited any particular litany of questions.

In the present case, it is obvious that the district court properly concluded that Jenkins' waiver was knowing and intelligent. It is abundantly clear from Jenkins' responses to Judge Metzner's questions that Jenkins completely understood the potential risks arising from Abady's application to the U.S. Attorney's Office. Further, Jenkins had at least twenty-four hours to consult

with Abady and decide how he wished to proceed. Indeed, when the district judge asked Jenkins whether he had carefully considered the matter, he replied, "I prayed about it all night." Jenkins also was offered and rejected the opportunity to consult with outside counsel. Finally, we think it is highly significant that Jenkins was no neophyte to the criminal justice system. Rather, he was a lawyer who had been employed both as an assistant district attorney and as a defense attorney. Moreover, while a State Senator, Jenkins had served on the Judiciary Committee and the Committee on Crimes and Corrections. Thus, as Judge Metzner noted, Jenkins was extremely well-suited to determine whether he wished to proceed with Abady as his trial counsel. Under these circumstances, we have no difficulty concluding that Jenkins knowingly and intelligently waived his right to conflict-free counsel.

CONCLUSION

We have reviewed each of the defendant-appellant's remaining arguments and find them to be without merit. For the reasons stated above, the judgment of conviction is affirmed.